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IN THE

Supreme Court of the United States

October Term, 1957

No. 342

PAUL E. KERN, a holder of Kentucky Fuel Gas Corporation First Mortgage Bonds and 6½% Debentures,
Petitioner,

vs.

BEN WILLIAMSON, JR., as Trustee of INLAND GAS CORPORATION and of KENTUCKY FUEL GAS CORPORATION, THE COLUMBIA GAS SYSTEM, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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August 2, 1957

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Paul E. Kern, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit affirming an order of the United States District Court for the Eastern District of Kentucky.

Opinions Below

The District Court (Ford, *J.*) wrote no opinion. Its order appears in Appendix A attached hereto, at pp. 20 to 22, *infra*. The opinion of the Court of Appeals (Simons, *C. J.*, with Miller and Martin, *JJ.*) Simons, *C. J.*, dissenting, is reported at 241 F. 2d 374 and appears in Appendix A, at pp. 23 to 43, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on February 14, 1957 (see p. 44, *infra*). A timely petition for rehearing was filed on March 5, 1957 and was denied by the Court of Appeals on May 8, 1957 (see pp. 45-46, *infra*). The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code.

Questions Presented

1. Whether the power of the Bankruptcy Court to subordinate the debt claims of a faithless parent holding company to the debt claims of its subsidiaries' public security holders has been so restricted, either by this Court's decisions in *City of New York* v. *Saper*, 336 U. S. 328 (1949) and related cases[1] or otherwise, as to forbid subordination to the post-bankruptcy interest[2] accrued on unsecured public claims.

2. Whether the absolute priority rule embodied in the "fair and equitable" standard of Chapter X of the Bankruptcy Act has been so limited, by reason of the decisions of this Court in the *Saper* and related cases or otherwise, as to deny to post-bankruptcy interest on the unsecured claims of security holders the priority to which their principal is entitled.

Statutes Involved

The pertinent provisions of the Bankruptcy Act are set forth in Appendix B attached hereto, at pp. 47-48, *infra*.

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[1] *U. S.* v. *Edens*, 342 U. S. 912 (1952); *U. S.* v. *General Engineering & Mfg. Co.*, 342 U. S. 912 (1952); *U. S.* v. *Bloom*, 342 U. S. 912 (1952).

[2] The term "post-bankruptcy interest," when used herein, refers to interest accruing after the commencement of receivership or the filing of the petition in bankruptcy or reorganization.

Statement

These are reorganization proceedings under Chapter X of the Bankruptcy Act (11 U. S. C. § 501 *et seq.*), involving three closely inter-related principal debtors, American Fuel & Power Company ("American") and its two subsidiaries, Kentucky Fuel Gas Corporation ("Kentucky") and Inland Gas Corporation ("Inland").

The business of the American system is the production, purchase, and distribution at wholesale, of natural gas to industrial consumers (Al. App. 52-A to 63-A [3]). It was begun in 1927 and was financed largely by the public flotation of debt securities of the three debtors. From the time of its formation the system represented a serious competitive threat to Columbia Gas and Electric Corporation (now The Columbia Gas System, Inc., and herein referred to as "Columbia"). To eliminate that threat, Columbia "conceived a scheme to wreck" the system (122 F. 2d 223, 229), and in execution of that scheme, by 1930 acquired 76% of American's stock and approximately 35% of the aggregate indebtedness of the three debtors. Promptly after Columbia acquired control of the system, it forced the operating companies into receivership and, through its ownership of system securities, dominated the proceedings and eventually destroyed a substantial portion of the system's assets and potential. As the Court below found, "for the purpose of destroying" the system, Columbia "drew to itself the lifeblood of all the debtors and picked the flesh

[3] The record filed herein, which is the same as that on petitions already filed in this case, e.g. Nos. 241, 274 and 325, this term, consists of a certified copy of all Appendices filed below and of the proceedings in the Court of Appeals. Since the pages have not been numbered consecutively, we refer to the pages in the relevant Appendices as follows:

Appendix of	
Allen Committee and Edward D. Spilman	Al. App.
Trustees Ben Williamson, Jr. and Clinton M. Harbison	Tr. A.
Paul E. Kern	K. A.
Securities and Exchange Commission	C. A.

from the bones of these corporate entities" (122 F. 2d 223, 228). The Court concluded that Columbia's conduct violated the Federal antitrust laws, and that its result was "to defraud the minority interests of the debtors" (122 F. 2d 223, 229). As a consequence, it later directed that all of Columbia's claims against each of the debtors be subordinated to "the claims of all other creditors of every class" in the system (151 F. 2d 461, 470; 187 F. 2d 813, 817).[4]

Petitioner Paul E. Kern is a public creditor of Kentucky. He owns $773,600 principal amount of Kentucky's First Mortgage Bonds and $13,950 principal amount of Kentucky's Debentures. Other parties in the proceedings represent other public holders of Kentucky bonds and debentures and of American notes and stock. Since March 28, 1939, the Securities and Exchange Commission (the "Commission") has also participated, as permitted by Section 208 of the Bankruptcy Act (11 U. S. C. § 608).

During the course of these protracted proceedings there has been a material increase in the earnings of the American system, and thus in the value of its assets. Columbia having been subordinated, the system was able to make payments aggregating approximately $10,250,000 in retirement of substantial portions of principal and post-bankruptcy interest on its publicly held debt. Most of those payments went to the public holders of direct obligations of Inland, whose claims were paid in full,[5] and the balance went to American note holders and Kentucky bondholders (Al. App. 54-A-55-A, 58-A, 62-A). In more recent years earnings have continued to increase, so that as of

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[4] The bulk of the system's physical assets are owned by Inland. Under the cited decisions, the public creditors of American and Kentucky are entitled to share in Inland's assets in priority to Columbia.

[5] One aspect of their claims, the asserted right to receive interest on interest, was before this Court in *Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156 (1946).

December 31, 1955, the value of the system's assets totalled approximately $9,800,000.[6]

The claims of the remaining public holders of debt securities and of Columbia against these assets, as set forth in the Trustees' plan (Al. App. 56-A, 67-A to 75-A), with interest to December 31, 1955 computed at the contract rates but reduced by the amounts of past partial distributions, were approximately as follows as of December 31, 1955:

		Principal	*Interest*	*Total*
CLAIMS OF PUBLIC HOLDERS OF:				
American	7% Gold Notes	$1,905,100	$2,533,783	$ 4,438,883
Kentucky	6½% First Mortgage Bonds	2,236,600	3,316,692	5,553,292
	6½% Debentures	542,000	901,300	1,443,300
	Totals	$4,683,700	$6,751,775	$11,435,475
CLAIMS OF COLUMBIA AS HOLDER OF:				
Inland	6½% First Mortgage Bonds	$1,571,054	$2,610,965	$ 4,182,019
	7% Second Mortgage Debentures	320,000	569,511	889,511
	General claim for advances	252,313	413,775	666,088
American	7% Gold Notes	60,000	107,100	167,100
	6% Demand Notes	552,000	841,568	1,393,568
	General claim for advances	17,000	—	17,000
Kentucky	6½% First Mortgage Bonds	1,685,871	2,755,204	4,441,075
	6½% Debentures	397,600	661,176	1,058,776
	General claim for advances	65,607	107,652	173,259
	Totals	$4,921,445	$8,066,951	$12,988,396

The assets are thus more than sufficient to cover the principal of all of the claims of the public creditors of the system. The controversy here turns on the question whether the

[6] This value is based on the Trustees' Plan (Al. App. 51-A to 81-A) which in turn was predicated upon an offer by Tennessee Gas Transmission Company to purchase the system's physical assets for $8,000,000 (Al. App. 65-A) and upon net current assets of approximately $1,800,000 (Al. App. 76-A to 77-A).

excess values which are available for satisfaction of post-bankruptcy interest on claims of the system's public unsecured creditors must, as a matter of law, be diverted to Columbia's subordinated claims.

This issue arose at the hearing on confirmation of a plan proposed by the Trustees for the sale of the physical assets of the system and distribution of the proceeds, together with other net assets, to the public creditors of the system in payment of the principal and interest accumulated on their claims. The assets being insufficient to pay such claims in full, Columbia was not to participate (Al. App. 65-A). The District Court had referred the plan to the Commission, whose Report (Corp. Reorg. Rel. No. 98 [1956]) advised that it was fair, equitable and feasible. The District Court so found, approved the plan under Section 174 of the Bankruptcy Act (11 U. S. C. § 574) and directed that it be submitted to the vote of security holders (Tr. A. 54-59).

Kentucky bondholders rejected the Trustees' plan by approximately a two-thirds vote, primarily because adverse Federal tax rulings indicated that the debtors' estates would be subject to substantial capital gains tax upon the sale of assets (Tr. A. 60-71, 72-73, 109). The Trustee of Inland and Kentucky thereupon petitioned for a determination as to the tax consequences of the sale of assets (Tr. A. 74-81). The American Trustee petitioned for confirmation of the plan under the "cram down" provision of Chapter X (Tr. A. 84-86). Petitioner opposed the "cram down" (Tr. A. 87-90), and the Commission urged that, particularly in view of the availability of an alternative plan proposed by petitioner, the Trustees' plan should not be "crammed down" while the tax questions were undecided (Tr. A. 109; C. A. 1a-2a; Corp. Reorg. Rel. No. 98 [1956], p. 21).

During the resulting hearing, the District Judge stated that although "nobody has raised a question" as to the right of the Kentucky bond and debenture holders

to post-bankruptcy interest, he was "suggesting it as a possible question" (K. A. 5a). The Judge added that this issue, which he alone thus raised, might pose such "a serious threat" to the Kentucky bondholders as to induce petitioner to withdraw his objections to the Trustees' plan, which accorded recognition to such interest, and take a chance that the Court would confirm that plan in spite of any attack that might be made on the post-bankruptcy interest point (K. A. 5a-6a). Petitioner declined to withdraw his objections (Tr. A. 110). Thereupon, the District Judge announced from the bench, without any application for such relief by Columbia or anyone else and without calling for briefs or formal argument on the question, that he would not allow post-bankruptcy interest on the Kentucky bonds and debentures (Tr. A. 110; C. A. 3a).[7]

The District Judge subsequently entered an order (Appendix A, at pp. 20 to 22, *infra*) denying the relief sought by the Inland Trustee on the tax question, stating that the Trustees' Plan was "erroneous in allowing * * * post-bankruptcy interest" to Kentucky's public creditors (p. 21, *infra*) and declining to confirm that plan. The order went on explicitly to direct the Trustees to formulate a new plan "which will eliminate the recovery of post-bankruptcy interest by the public creditors of Kentucky Fuel Gas Corporation" (p. 22, *infra*).

The offer to purchase the system's assets, upon which the Trustees' plan was based, was withdrawn during the pendency of the appeals to the Court below. However, that Court affirmed the order of the District Judge, including

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[7] In the colloquy from the bench, the District Judge went further, stating that any new plan need be submitted "to only Columbia for acceptance" (C. A. 3a, Tr. A. 110). Apparently he believed that as a result of his ruling on post-bankruptcy interest, the holders of Kentucky bonds and debentures, upon receiving payment of their principal, would be paid in full, even though the interest portion of their claims remained unsatisfied; that they would no longer be persons "affected" by a plan within the meaning of Chapter X and therefore would not be entitled to vote on any plan.

specifically the direction to the Trustees to propose a new plan eliminating post-bankruptcy interest on Kentucky's publicly held bonds and debentures, Simons, *C. J.*, dissenting on that point (see pp. 34-35, and 46, *infra*).

To understand the significance of the ruling of the courts below, it is necessary to note that the history of these proceedings is primarily that of a prolonged struggle between the public creditors of the system on the one side, and Columbia (and often the debtors' Trustees[5]) on the other, for priority in claim to the system's available assets. On three occasions—in 1941, 1945 and 1951—the Court below was faced squarely with Columbia's efforts to claim a portion of the debtor's assets at the expense of the public creditors (122 F. 2d 233 [1941]; 151 F. 2d 461 [1945] rehg. and mod. den. 153 F. 2d 101 [1946], cert. den. 329 U. S. 737 [1946]; 187 F. 2d 813 [1951]). On two later occasions, Columbia's claims were collaterally involved (211 F. 2d 381 [1954], cert. den. 348 U. S. 840 [1954]; 217 F. 2d 207 [1954]). On none of these occasions, nor at any other time, did the Court below in any way qualify its findings as to Columbia's culpability, or its conclusion that the damage caused by Columbia to all of the system's public security holders, while not determinable with precision, was nonetheless of such magnitude as to require subordination of Columbia's claims (151 F. 2d 461, at 469; 153 F. 2d 101, 102) until all public creditors of the three debtors were "fully paid" (211 F. 2d 381, 384, 217 F. 2d 207, 208).

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[5] The Trustees on more than one occasion sided with Columbia against the system's public creditors. Twice they succeeded in obtaining District Court approval of arrangements which allowed Columbia to share in the debtors' assets, only to be reversed by the Court of Appeals (see 122 F. 2d 223; 187 F. 2d 813). Moreover, according to the published reports they failed to participate in opposition to Columbia in the appellate proceedings reported at 151 F. 2d 461; and they did not appeal on the post-bankruptcy interest point in the Court below. Nor does the petition for certiorari filed here by the Trustee of Inland and Kentucky base its request for the writ or raise any question on the post-bankruptcy interest point, although that issue affects the disposition of approximately 40% of the value of the assets in his hands.

Despite this history, the Court below has now ruled that Columbia must be paid at least its principal[9] before Kentucky's public creditors receive their interest. This ruling was not based upon new facts or findings suggesting that Columbia was any less culpable than it had previously been found to be. Nor was there any suggestion that Kentucky's public creditors had suffered any less damage than those of Inland, who have already received full payment, including post-bankruptcy interest. On the contrary, the Court below concluded that it must limit the restitution provided through the subordination remedy to the principal amount of the public creditors' claims because it understood it was required to do so by the decisions of this Court in *City of New York* v. *Saper*, 336 U. S. 328 (1949), and related cases.

Reasons Relied on for Allowance of the Writ

First: The Court below decided an important question of law in the administration of the Bankruptcy Act in a way which conflicts with the decision of this Court and the subsequent decision of the Court of Appeals for the Tenth Circuit in the *Deep Rock* reorganization, and contradicts the principles which this Court has held to govern the equitable subordination of claims in bankruptcy.

In *Taylor* v. *Standard Gas and Electric Company*, 306 U. S. 307 (1939), this Court directed the subordination of the debt claims of the parent of Deep Rock Oil Corporation, a debtor in reorganization, to the claims of Deep Rock's public preferred stockholders. Deep Rock also had public unsecured noteholders whose claims, including post-bankruptcy interest, this Court's opinion explicitly assumed

[9] The principal amount of Columbia's claims is $4,921,445. In its brief in the Court below, Columbia claimed that it had "total claims of $7,979,403 (principal plus interest on *secured* obligations)" with respect to which it was apparently asserting priority over the unsecured interest claims of Kentucky's public security holders (Br. p. 38).

would first be satisfied in full before the parent's subordinated debt claims could be honored (306 U. S. at 314). The plan formulated in accordance with this Court's direction subordinated the debt claims of the parent to the claims for post-bankruptcy interest and dividends on Deep Rock's publicly held unsecured notes and preferred stock. The Court of Appeals for the Tenth Circuit upheld the plan, expressly rejecting the contention that the so-called "bankruptcy rule" as to post-bankruptcy interest forbade such subordination *In re Deep Rock Oil Corp.*, 113 F. 2d 266, 269 (C. A. 10, 1940); cert. den. 311 U. S. 699 (1940).

In direct conflict with these decisions, the Court below held it was obliged to restrict the subordination previously ordered for Columbia's claims to subordination to the principal of the public security holders' unsecured claims, on the ground that it could not lawfully subordinate Columbia to the post-bankruptcy interest on the public's claims. The Court acknowledged that this result was inconsistent with the *Deep Rock* decisions. But it thought the *Deep Rock* doctrine had been modified by the decisions of this Court in *Saper* and related cases (see pp. 38-39, *infra*).[10]

The decision below not only conflicts with the *Deep Rock* reorganization cases (see also *Eddy* v. *Prudence Bonds Corporation*, 165 F. 2d 157, 159-160 [C. A. 2, 1947], cert. den. 333 U. S. 845 [1948]), but it erodes the principles upon which this Court rested its *Taylor* and following decisions—*Pepper* v. *Litton*, 308 U. S. 295 (1939); *American United Mutual Life Insurance Co.* v. *City of Avon Park*, 311 U. S. 138 (1940); *Sampsell* v. *Imperial Paper & Color Corporation*, 313 U. S. 215 (1941). Under those principles, whatever may be the rationale of decisions disallowing interest claims in other contexts (*e.g.*, *Jamison*

[10] Counsel for Columbia, long experienced in bankruptcy reorganization, also are of the view "that, in so far as the Tenth Circuit's decision on remand of *Deep Rock* conflicts with the Supreme Court's subsequent *Saper* and *Ecker* decisions, it is overruled" (Columbia Reply Br. in the Court below, p. 9).

. F. D. I. C., 149 F. 2d 199 [C. A. 5, 1945]; *New York Trust Co. v. Detroit, T. & I. Ry. Co.*, 251 Fed. 514 [C. A. 6, 1918]), the "power of the bankruptcy court to subordinate claims or to adjudicate equities" in order to compensate for a controlling person's past iniquities is "complete" (*Sampsell v. Imperial Paper & Color Corporation*, 313 U. S. 215, 219). And where matters affecting interest are concerned "the touchstone of each decision * * * has been a balance of equities * * *." (*Vanston Bondholders Protective Committee v. Green*, 329 U. S. 156 at 165).

In contrast, under the ruling below, the court is precluded from making adjustments which the equities may require.[11] It becomes an instrument for rewarding the wrongdoer. It must withhold interest from public security holders during the period of bankruptcy, and, when distribution is finally made, must allocate the values available to pay the interest thus withheld to the very person who was ordered to be subordinated for having deliberately caused the bankruptcy and injured the debtors and their public security holders.

Both the import and the incongruity of the ruling below are emphasized by the Court's reliance on what it deemed to be the command of this Court in *Saper* and related cases, which deal with the special statutory priority accorded to tax claims. In those cases, this Court found on the basis of specific legislative history[12] that Congress intended to bring interest on tax claims within the "bankruptcy rule" applicable to post-bankruptcy interest on unsecured claims generally (see 336 U. S. at 330, note 7), even though the principal of tax claims enjoyed a statutory priority over

[11] The irrationality of the conclusion of the Court below that it had no power to subordinate Columbia to the Kentucky post-bankruptcy interest is emphasized by its recognition of its power totally to reject Columbia's claims.

[12] In *Saper*, this Court noted (336 U. S. at 329 n. 5) that underlying the legislation was "frequently expressed dissatisfaction over the inroads taxes and interest thereon make in the fund available for creditors."

other unsecured claims. On the facts there presented, the "bankruptcy rule" operated to preclude recognition of interest on the tax claims.

Significantly, this "rule" is designed in large part to preserve equality among creditors of equal rank as of the date of insolvency by preventing the delays caused by the law in administering a bankrupt's assets from operating unequally among creditors. See *American Iron and Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 266-267 (1914); *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 163-164 (1946); cf. *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 411 (1938). In contrast, the *Deep Rock* principle is designed to deny equality to the claims of the faithless parent so that restitution may be made to the public claimants for the damage caused by its misconduct of the subsidiary's affairs.

The incongruity of extending the "bankruptcy rule" to a case of equitable subordination of a wrongdoer is accentuated in cases like this where it is the parent's misconduct which is the effective cause of withholding or delaying interest payments to public security holders. The reliance for that result upon *Saper* and related decisions of this Court, which are grounded uniquely in considerations peculiar to tax claims, underscores the need for the exercise by this Court of its corrective power.

Second: The decision below conflicts with the absolute priority rule which this Court has repeatedly held to be integral to the "fair and equitable" standard governing corporate reorganizations.

Under the absolute priority rule, as was pointed out in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527 (1941), "accrued interest * * * is entitled to the same priority as the principal. See *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 266, 267; *Ticonic National Bank* v. *Sprague*, 303 U. S. 406." This requirement applies to post-bankruptcy interest on all

types of claims, whether secured,[13] or unsecured,[14] and to post-bankruptcy dividends on preferred stock.[15]

Departing from that requirement, the Court below denied that interest on the publicly held Kentucky bonds and debentures was entitled to the same priority as principal. To reach this result, it declined to confine the "bankruptcy rule" to claims of equal rank, and instead interpreted *Saper* and *Edens* to require the extension of that "rule" to the claims of security holders of different rank in a corporate reorganization, and specifically to hold that payment of the principal of unsecured bondholders' claims is payment "in the manner which the bankruptcy law recognizes as payment in full" (p. 36, *infra*).

We doubt that, apart from special considerations such as those found in *Saper* to govern tax claims, there is any rule as between security holders of different rank, even in straight bankruptcy, which denies to interest the same priority as principal. Indeed the historical "exceptions"

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[13] *E.g., Group of Institutional Investors* v. *Chicago M. St. P. & P. R. Co.*, 318 U. S. 523, 546 (1943); see *Eddy* v. *Prudence Bonds Corporation, supra.* By the same token, to the extent of a deficiency of pledged assets to satisfy a secured claim, principal is treated like the principal of unsecured claims and interest is treated like the interest on unsecured claims. Cf. *Group of Institutional Investors* v. *Chicago M. St. P. & P. R. Co.*, 318 U. S. at 572-573.

[14] *E.g., Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. at 514-516, 520-521, 527, dealing with the priority, as against stockholders, of bondholders' claims for accrued interest against unmortgaged assets. See also *In re Deep Rock Oil Corporation, supra*, at 269; *Central States Electric Co.* v. *Austrian*, 183 F. 2d 879 (C. A. 4, 1950), cert. den. 340 U. S. 917 (1951). The ICC includes post-bankruptcy interest in the computation of the claims of both secured and unsecured creditors which must be satisfied before lower ranking claims may participate. See *e.g., Chicago, R. I. & Pac. Ry. Co.* v. *Fleming*, 157 F. 2d 241 (C. A. 7, 1946), cert. den. 329 U. S. 780 (1946).

[15] *E.g., Petition of Portland Electric Power Co.*, 162 F. 2d 618, 622 (C. A. 9, 1947), cert. den. 332 U. S. 847 (1947); *In re Deep Rock Oil Corporation, supra*, at 269; *Central States Electric Co.* v. *Austrian, supra*, at 885-888.

to the "bankruptcy rule", to which the Court below alludes (see pp. 31-32, 35-36, *infra*) and this Court alluded in *Saper* (336 U. S. at 330, note 7), demonstrate that where claims of different rank are involved, interest does not "stop", because the "bankruptcy rule", in conformity with the absolute priority rule, requires the same priority for interest (whether pre or post-bankruptcy) as for principal.[16]

But, whatever may be the "rule" in straight bankruptcy, it is startling to see the absolute priority rule which governs security holders' claims in corporate rerganizations under Chapter X[17] undermined on the basis of decisions in which this Court applied the "bankruptcy rule" to limit the

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[16] *E.g.*, (1) as between senior and junior lienors on a common security (*American Iron and Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 266 (1914); *Central Trust Co.* v. *Condon*, 67 Fed. 84, 98 (C. A. 6, 1895) (Taft, J.); *Richmond & I. Const. Co.* v. *Richmond N. I. & B. R. Co.*, 68 Fed. 105, 116 (C. A. 6, 1895), cert. den. 163 U. S. 679 [1895]), (2) as between secured creditors and unsecured creditors to the extent the security is adequate to pay principal and interest (see *Coder* v. *Arts*, 213 U. S. 223, 228-229, 245 [1909]; *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 411-412 [1938]; cf. *Sexton* v. *Dreyfus*, 219 U. S. 339, 346 [1911]), and (3) as between any and all creditors, whether secured or unsecured, and the debtor to the extent any assets are available for the debtor (*Johnson* v. *Norris*, 190 Fed. 459, 463 [C. A. 5, 1911], cert. den. 232 U. S. 723 [1914]). Although no decision of this Court expressly so holds in straight bankruptcy, it is difficult to see why the principle which requires post-bankruptcy interest to be accorded priority as between senior and junior lienors on common security does not apply equally as between senior and junior unsecured creditors, other than tax claimants or others who are governed by special considerations.

[17] Even if the enactment of the "bankruptcy rule" in Section 63(a) of the Bankruptcy Act (11 USC Sec. 103(a)), could be said to limit provability and allowability of post-bankruptcy interest where claims of different rank are involved in ordinary bankruptcy (but cf. p. 13, *supra*) it has no application to reorganizations under Chapter X in view of Section 102 of the Bankruptcy Act (11 USC Sec. 502) and the broad definition of "claims" in Section 106(1) (11 USC Sec. 506(1)).

special statutory priority of tax claims to their principal. To be sure, the particular considerations affecting tax claims apply to such claims in corporate reorganizations as well as in straight bankruptcy (*United States* v. *Edens*, 342 U. S. 912 [1952]). But nothing ever held by this Court in any case suggests that *Saper* or *Edens* was intended to govern anything other than tax claims; certainly not the determination of priorities as to interest among security holders *inter se* in corporate reorganizations.

Nevertheless, this Court's statement in *Saper* that tax claims are to be treated no differently from other debts because Congress has "assimilated taxes to other debts for all purposes, including post-bankruptcy interest" (336 U. S. 337-338) has become the basis for expansive application of that decision by the lower Federal courts.[18] This process has culminated in this case in the extension of that decision to the claims of security holders of different rank *inter se* in a corporate reorganization under the "fair and equitable" standard. The doubts thus cast upon the priority to be accorded post-bankruptcy interest on security holders' claims in all kinds of insolvency, but particularly under the "fair and equitable" standard of Chapter X call imperatively for clarification by this Court.

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[18] Thus, it has been explicitly stated, albeit in a case involving a tax claim, that since this Court's decision in *Saper*, no claim of any kind bears interest after bankruptcy, and that therefore no claim for post-bankruptcy interest in a corporate reorganization is any longer entitled to the benefit of the rule of absolute priority (*State of New York* v. *Feinberg*, 204 F. 2d 502, 503 [C. A. 2, 1953]). No other lower court decision except that below has gone so far. However, the lower Federal courts have cited *Saper* in cases which sometimes grant and sometimes deny recognition of post-bankruptcy interest on non-tax claims, as part of a general body of authority for the "rule" on post-bankruptcy interest (Compare *e.g.*, *In re Macomb Trailer Coach, Inc.*, 200 F. 2d 611, 613 [C. A. 6, 1952] cert. den. sub nom. *McInnis* v. *Weeks*, 345 U. S. 958 [1953], and *In re Worden*, 107 F. Supp. 496 [W. D. Ky., 1952], with *Oppenheimer* v. *Oldham*, 178 F. 2d 380 [C. A. 5, 1949], and *Meinhard, Greene & Co., Inc.* v. *Brown*, 193 F. 2d 70, 74 [C. A. 4, 1952]).

Third: The issues raised by the decision below are of large significance in the administration of the Bankruptcy Act.

Post-bankruptcy interest is an important component of claims presented in all corporate reorganizations. To be sure, in the instant case, almost twenty-seven years of proceedings have produced an interest claim which is substantially greater than the principal. But the history of corporate reorganizations discloses that the proceedings generally extend over period ranging from five to twenty years, and in the case of railroads sometimes longer.[19] Such delay is not infrequently caused by junior, and often controlling, interests who thereby can speculate on an increase in the earnings and value of the underlying assets while the senior interests who hold the major, and often the exclusive, claims upon the assets, bear the risk. The barring of post-bankruptcy interest to senior security holders who are subject to such risks would constitute a radical dilution of their rights in corporate reorganizations.

Nor does the fact that the decision below purports to be limited to interest on unsecured claims detract from its importance. Where the question involved is one of subordination or of absolute priority, no rational distinction can be drawn between secured and unsecured claims. Thus, the ruling below casts a shadow upon both types of claims. But even if the impact of the decision below could be confined to unsecured claims, it should be noted that the volume of unsecured notes and debentures publicly owned and traded in the nation's capital markets is so substan-

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[19] See e.g. data collected for railroad reorganizations in *Dembitz, Progress and Delay in Railroad Reorganizations since 1933*, 7 Law and Contemporary Problems, 393 (1940); and for Chapter X reorganizations in Billyou, *A Decade of Reorganization under Chapter X*, 49 Col. L. Rev. 456, 495 (1949).

tial [20] that it affects the interests of large numbers of investors—both institutional and individual.

Fourth: These proceedings imperatively call for the exercise at this time of this Court's supervisory power over the Federal courts.

These proceedings have already endured for almost twenty-seven years, largely in the struggle of the public creditors against Columbia. Under the judgment below, the Trustees are directed to formulate a new plan which eliminates public creditors' post-bankruptcy interest. If, as we submit, that decision is improper, the parties will be remitted to further extensive and time-consuming procedures in the courts below, all focused on a plan whose major premise is untenable. Moreover, intimations have already appeared in these proceedings to suggest substantial controversies to which this premise will give rise in the formulation and judicial assessment of any new

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[20] The following table, compiled from Standard Corporation Descriptions, shows the volume of new offerings of debt securities of non-governmental domestic issuers, and the portion thereof which is unsecured, during the years 1951-1956:

Year	New Offerings of Debt Securities *Principal Amount*	Unsecured Notes and Debentures *Principal Amount*	*Percent % of Total Represented by Unsecured Debt*
1951	$2,752,457,272.	$ 929,508,400.	34
1952	3,735,106,411.	1,732,574,000.	46
1953	4,511,962,005.	1,929,299,830.	43
1954	4,346,019,970.	1,872,394,720.	43
1955	4,038,020,850.	2,272,210,850.	56
1956	4,627,735,095.	2,614,116,895.	56

See Standard Corporation Descriptions, New Bond Offerings, Vol. 13 (1951) pp. 53-61, Vol. 14 (1952) pp. 52-61, Vol. 15 (1953) pp. 49-57, Vol. 17 (1954) pp. 64-73, Vol. 18 (1955) pp. 68-79, and Vol. 18 (1956) pp. 56-67.

plan,[21] as well as in the process of obtaining security holder approval thereof (cf. note 7, *supra*). Nor do the several prior opinions of the Court of Appeals in these proceedings dealing with the competing claims of the security holders of the various debtors—both *inter se* and against Columbia—by any means resolve these controversies.

In short, correction of the order of the Court below at this time is imperative if further needless delay in already unduly protracted proceedings is to be avoided. This is compellingly a case in which the grant of certiorari "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause" (*American Construction Co.* v. *Jacksonville T. & K. W. Railways Co.*, 148 U. S. 372, 384 [1893]) because resolution of the post-bankruptcy interest question at this time is "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945); *Larson* v. *Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 685 n. 3 (1949); *Land* v. *Dollar*, 330 U. S. 731, 734 n. 2 (1947); *Chapman* v. *Sheridan Wyoming Co.*, 338 U. S. 621, 622 (1950).

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[21] Thus Columbia has suggested in its brief below that as the holder of secured obligations of Inland it is entitled to be paid not only principal but all post-bankruptcy interest thereon before the public holders of Kentucky's "unsecured" bonds and debentures receive interest (See note 9 *supra*). There is also the question whether the considerations which impelled the Court to disentitle Kentucky's security holders to post-bankruptcy interest do not apply equally to American's "secured" public creditors because their "security" is valueless. Finally, with the increasing cash assets of the system, payment of only the principal amount of the claims of all creditors, including Columbia, will leave a surplus of assets available for distribution on account of such post-bankruptcy interest. The proper allocation of that fund among the various post-bankruptcy interest claimants will present novel and time-consuming legal problems.

CONCLUSION

The writ of certiorari to the United States Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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August 2, 1957.

APPENDIX A

Order of H. Church Ford, U. S. D. C. J., Dated March 14, 1956, From Which Appeal Was Taken to United States Court of Appeals for the Sixth Circuit

This cause came on for hearing on March 8, 1956, at Lexington, in said district, pursuant to notice duly given as provided by law.

Thereupon the Court proceeded to consider the petition of Clinton M. Harbison, Trustee of American Fuel & Power Company, praying that the Court confirm the "Amended Plan of Reorganization dated February 12, 1953, as further amended September 23, 1955, and as finally amended", under the provisions of Sections 179 and 216(7) of the Bankruptcy Act, regardless of the fact that two-thirds in amount of the public holders of Kentucky Fuel Gas Corporation bonds have not accepted said plan. And the Court heard testimony offered in support of the confirmation of said plan and also heard argument of counsel in favor of the confirmation of said plan, by counsel for said Clinton M. Harbison, Trustee as aforesaid; and by counsel for Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation, and by counsel for various interested creditors herein, and also heard argument of counsel for Paul E. Kern and counsel for certain American Fuel & Power Company stockholders in opposition to the confirmation of said plan. The Court also heard a statement by counsel for the Securities Exchange Commission to the effect that further consideration of the confirmation of said plan should await a determination of the federal income tax question raised by petition filed herein by Ben Williamson, Jr., Trustee as aforesaid, as hereinafter mentioned.

Without making any decision upon said petition of Clinton M. Harbison, Trustee as aforesaid, the Court called up for consideration the petition filed herein by said Ben

Williamson, Jr., Trustee as aforesaid, for an adjudication that no federal income tax liability will be incurred by the estates of the Debtors by reason of the sale of certain assets as provided in said Plan, and for injunctive relief. Thereupon came Henry J. Cook, United States Attorney, and C. S. Titus, special counsel, and appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for the District of Kentucky, and filed a motion to dismiss said petition of Ben Williamson, Jr., Trustee, for want of jurisdiction. After hearing argument of counsel on said motion, the Court was of opinion that said petition is in effect an application for a declaratory judgment and under the provisions of the Federal Declaratory Judgment Act this Court is without jurisdiction to entertain the petition. Whereupon it is ORDERED that said motion be and the same is hereby sustained and said petition of Ben Williamson, Jr., Trustee as aforesaid, is hereby dismissed.

The Court then proceeded to consider further the above mentioned petition of Clinton M. Harbison, Trustee as aforesaid, to confirm said plan. And thereupon the Court announced from the bench that he was of opinion that the public holders of bonds and debentures of Kentucky Fuel Gas Corporation, being unsecured creditors, are not entitled to post-bankruptcy interest on their claims and that said plan is erroneous in allowing such post-bankruptcy interest, and for that reason, and for the further reason that the Court lacks jurisdiction and hence cannot pass upon the tax question presented by said petition of Ben Williamson, Jr., Trustee as aforesaid, and because of the uncertainty resulting from such undetermined tax question, the Court was of opinion that the plan should not be confirmed. Whereupon it is ORDERED that said petition of Clinton M. Harbison, Trustee as aforesaid, be and the same is hereby dismissed and confirmation of said plan is denied.

The Court then proceeded to consider the proposed plan of reorganization offered by Paul E. Kern, and dated July 7, 1955, and the Court was of opinion that said Kern plan is not worthy of consideration for the reason that it proposes to encumber the reorganized corporation with a heavy indebtedness, and for other reasons stated from the bench. Whereupon it is ORDERED that said Kern Plan be and it is hereby adjudged not worthy of consideration within the meaning of Chapter X of the Bankruptcy Act.

The Court then directed the Trustees herein to prepare and file a new Plan of Reorganization which will eliminate the recovery of post-bankruptcy interest by the public creditors of Kentucky Fuel Gas Corporation.

Robert S. Spilman, Jr., counsel for certain stockholders of American Fuel & Power Company then moved the Court to require Ben Williamson, Jr., Trustee as aforesaid, to mail to him certain statements with respect to the business, and operations of Inland Gas Corporation. Whereupon it is ORDERED that said Trustee shall forthwith furnish to said counsel copies of monthly reports gotten out by said Trustee for the year 1955, and hereafter furnish to said counsel copies of all reports with respect to Inland Gas Corporation and its business and operations which are furnished by said Trustee to other counsel of record in this proceeding.

March 14, 1956.

Enter,

/(s) H. CHURCH FORD,
Judge.

Opinion of United States Court of Appeals for the Sixth Circuit, Dated February 14, 1957

In re INLAND GAS CORPORATION, Debtor.

In re KENTUCKY FUEL GAS CORPORATION, Debtor.

In re AMERICAN FUEL & POWER COMPANY et al., Debtor.

Nos. 12861-12867.

Before SIMONS, Chief Judge, and MILLER and MARTIN, Circuit Judges.

SIMONS, Chief Judge.

After more than twenty-six years of Receiver and Trustee operation of the Debtors' properties, of litigation delaying reorganization under Chapter X of the Bankruptcy Act, 11 U. S. C. A. § 501 et seq., of consideration of numerous Plans for reorganization or liquidation and after five submissions and determinations in this Court of numerous issues, the tangled skein is again before us in seven appeals from an order of the District Court by the Trustees, the objecting creditors' Committees, and the proponent of still another Plan of reorganization. The order variously supported and assailed disapproves the latest submitted Plan and directs the Trustees to prepare and file a new Plan of reorganization so designed as to eliminate specific provisions of the submitted Plan and avoid the hazard of a substantial tax liability asserted by the Commissioner of Internal Revenue.

The past history of the debtor corporations is disclosed in the opinions of this Court in Columbia Gas & Electric Corporation v. United States, 6 Cir., 151 F. 2d 461, modification denied, 6 Cir., 153 F. 2d 101, certiorari denied 329 U. S. 737, 67 S. Ct. 48, 91 L. Ed. 636; In re Inland Gas Corporation, 6 Cir., 187 F. 2d 813; In re Inland Gas Corporation, 6 Cir., 208 F. 2d 13; In re Inland Gas Corporation, 6 Cir., 211 F. 2d 381, certiorari denied Kern v. Williamson,

348 U. S. 840, 75 S. Ct. 45, 99 L. Ed. 662; In re Inland Gas Corporation, 6 Cir., 217 F. 2d 207. Their present problems will, likewise, be herein detailed. Due to the insolvency of the Debtors, solution of their difficulties was first sought on December 2, 1930 by an equity receivership, followed since October 15, 1935 by proceedings under § 77B of the Bankruptcy Act and, finally, by corporate reorganization proceedings under Chapter X of the Bankruptcy Act. After much effort to formulate a Plan under the provisions of that Chapter, a Plan entitled "Amended Plan of Reorganization," dated February 12, 1953, was found to be fair, equitable and feasible, by the District Court, in an order entered on that date, but by reason of a challenge thereto, by appeal to this Court and by certiorari to the Supreme Court circumstances had so changed in respect to the dominant Inland Estate that the Plan could no longer be used without modification. The important new developments consisted of a substantial increase in the value of the Inland Estate since the earlier approval of the Plan and the receipt by the Trustees of an offer to pay $6,750,000.00 cash for the fixed assets of Inland and certain subsidiaries of American by the Texas Gas Transmission Corporation. The Court, thereupon, directed the Trustees to amend the reorganization Plan of 1953 to the extent necessary to embody therein the Texas offer and to make appropriate provision for a public auction of the fixed assets of the corporations with the amount of the offer to constitute a fair upset price. The Amended Plan of reorganization was thereafter so modified. It was found worthy of consideration and referred to the SEC. The upset price was in excess of the adjusted basis for Federal income tax purposes of the assets which were to be sold, so, the appellant, Trustee of Inland, applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale would result in any Federal income tax liability to Inland or its Trustee. It was the Trustee's position that the Texas Plan would fall within reach of § 337 of the

Internal Revenue Code of 1954, 26 U. S. C. A. § 337, and that no gain or loss should under its provisions be recognized. A later and better bid was thereafter received from the Tennessee Gas Transmission Company which offered $8,000,000.00 in cash for the same properties which it confirmed by a deposit of $400,000.00. In view of this offer, the Court, on July 14, 1955, directed the Trustees to prepare a new Plan of reorganization, which is the Plan here in controversy. It, like the Texas Plan, provides for the sale of the fixed assets of Inland and the subsidiaries of American, at public auction, to the highest bidder, with the Tennessee offer of $8,000,000.00 as a fair upset price. It provides for the distribution of the net proceeds of the sale and the proceeds of other assets of the Debtor and for the complete dissolution of the debtor corporations. The Texas Plan filed by the trustees, having been found worthy of consideration, was submitted to the SEC, which recommended disapproval. Thereafter the Texas Plan was superseded by the Tennessee Plan, which was submitted to the SEC and, as subsequently amended, was found by the SEC to be fair and equitable and feasible.

The Texas Plan having provided for a complete liquidation for the Debtors, the Commissioner of Internal Revenue, through the Director of Tax Rulings Division, issued a ruling that the proposed sale under the Texas Plan would result in the recognition of gain, for purposes of Federal income taxes. After the substitution of the Tennessee offer for that of Texas, the Trustees applied to the Commissioner for a reconsideration of its ruling but, on December 29, 1955, the Commissioner reaffirmed his original decision. It is estimated that if that decision is correct, the Federal tax involved would be approximately $1,192,000.00. In objecting to the Plan before it was approved as fair, equitable and feasible, and during the voting on the Plan by the creditors and when confirmation was under consideration, appellant Paul E. Kern relied principally, as grounds for his objections, upon these rulings and as an assumed

result of a letter sent by him to all Kentucky creditors, the Plan was not approved by them. Kern was not an original investor in the Kentucky bonds and debentures but began buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid.

After a hearing, the Court entered its order of March 14, 1956. It considered the petitions of the Trustees of American, Inland and Kentucky Fuel that the Plan last submitted be confirmed, heard counsel for Kern and certain stockholders of American in opposition to confirmation, and counsel for SEC, to the effect that further consideration of the Plan should await a determination of the Federal Income Tax question. Counsel appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for Kentucky and moved to dismiss the petition of the Inland Trustee for want of jurisdiction. The Court was of the opinion that the petition was in effect an application for a declaratory judgment and that under the provisions of the Federal Declaratory Judgment Act, 28 U. S. C. A. §§ 2201, 2202, it was without jurisdiction to entertain it. Whereupon, it ordered that the petition of the Trustee be dismissed. It also held that the public holders of bonds and debentures of Kentucky Fuel, being unsecured creditors,

were not entitled to post-bankruptcy interest on their claims and, that the Plan is erroneous in allowing such interest, and because the Court lacks jurisdiction and cannot pass upon the tax question, the Plan should not be confirmed. The Court also considered the proposed Kern Plan and, being of the opinion that the Plan was not worthy of consideration for the reason that it proposed to encumber the reorganized corporation with a heavy debt, it held the Kern Plan not worthy of consideration.

We are now advised by the Trustees of the Debtors that the Tennessee offer of $8,000,000.00 for the fixed assets of Inland and of American's subsidiaries has been withdrawn, under a reservation contained in its offer, and that the deposit of Tennessee, as evidence of its good faith, has now been released. In order that the record may be complete as of the date of this opinion, we have asked the Trustees to secure signed stipulations to supplement the record in this respect.. We assume that this will be done. We also assume that if a new Plan is submitted and approved which will contain either a provision for the sale of the assets of the Debtors or an internal Plan that will not provide for such sale, the offers of both the Texas and the Tennessee Companies will furnish some guidance to the Court as to their value, whether represented by distribution of cash or stock in a new corporation.

It is apparent that the more important issues, here involved, relate to the validity of the Commissioner's ruling on the taxability of proceeds of sale, if sale is made, and the provision in the Plan for post-bankruptcy interest to the holders of Kentucky bonds and debentures. Minor issues will also be dealt with.

The Tax Question. The Trustees contend, upon advice of counsel, that the Commissioner's ruling is arbitrary and capricious and in disregard of the plain language of § 337 of the Internal Revenue Code of 1954. That Section insofar as pertinent provides that if a corporation adopts a Plan of complete liquidation on or after June 22, 1954 and

within the twelve months period beginning on the date of the adoption of such Plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such twelve months period. Their contention is that this language is clear and unambiguous, making interpretation unneeessary; that liquidation is consistent with a reorganization proceeding under Chapter X and that the Plan meets every requirement of the Section involved, if it be given its plain meaning. The Commissioner's contention that the word "distributed" means a distribution of assets to stockholders in cancellation and redemption of stock is a rewriting of the statute by inserting in it the words "to stockholders" after the word "distributed," so as to make the phrase read "distributed to stockholders in complete liquidation." This, the Trustees say, he is not empowered to do. Moreover, it would be highly inequitable to recognize gain by an insolvent corporation when all of its assets are distributed to its creditors and nothing to its stockholders. Faced with the assertion of what they consider an illegal tax, they petitioned the Court for instructions as to its illegality, and sought injunctive relief against the officials who would assess the tax and undertake to collect it. Moreover, they argue that the Bankruptcy Court, in a Chapter X proceeding, has exclusive jurisdiction to determine the validity of post-bankruptcy taxes; that such taxes are expenses of administration and have so been recognized. They see no practical objection to the District Court passing upon the tax question now rather than following a sale of assets; that the objections thereto are highly technical and specious and should bow to the practical necessity of having the tax question put at rest, in order that an advantageous Plan of reorganization may be confirmed and the long drawn out proceedings brought to an end. They stress the opportunity that has been presented for a successful and prompt

reorganization by the $8,000,000.00 offer received by Tennessee. They say that, if withdrawn, the creditors will suffer and they will have no recourse against the Commissioner or anyone else. (This argument, of course, loses effectiveness by the withdrawal of the Tennessee offer and the release of its deposit.)

The Government, appearing specially, makes no response to the contention of the Trustees that § 337 must be literally applied and that there is no room for interpretation of its terms. It bases its objections to the relief prayed for in the several petitions of the Trustees upon jurisdictional and procedural grounds. There is, it says, no actual controversy in the constitutional sense. There has been no sale of assets, no assessment of taxes, and no effort to collect taxes. No possible taxable event had occurred at the time of the filing of the petitions, or since, and might never occur. The petitioners seek a declaratory judgment, even if what they ask for is not so denominated. It points out that the Declaratory Judgment Act, § 2201 Tit. 28 U. S. C., is limited to actual controversies and contains an express exception that it shall not apply "with respect to Federal taxes." In addition to the prayer for what in reality is a declaratory judgment, the Trustees also sought injunctive relief against the assertion and enforcement of any tax claim in connection with the possible sale of assets under the Plan but such restraint is barred by § 7421 of the Internal Revenue Code of 1954, 26 U. S. C. A. § 7421, which provides, with certain exceptions, that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. The exceptions refer only to instances where proceedings have been instituted before the Tax Court.

[1, 2] The rulings of the Commissioner are not lightly to be dismissed as arbitrary or capricious, and are based upon the Income Tax Regulations under the 1954 Code, 26 C. F. R. § 1.337-2(b). The problem with which § 337 was

concerned arose out of the decisions in Commissioner v. Court Holding Co., 324 U. S. 331, 65 S. Ct. 707, 89 L. Ed. 981, and United States v. Cumberland Public Service Co., 338 U. S. 451, 70 S. Ct. 280, 94 L. Ed. 251, and the Section was enacted to avoid nice distinctions between whether property was sold by a corporation or in reality by its shareholders. It was thought that technical distinctions were undesirable and § 337 was designed to eliminate them. While the Section speaks in terms of distribution, it is silent as to whom the assets are to be distributed. It may require clarification but that must await the happening of the taxable event. Meanwhile, the hazard of so substantial a tax liability is too great to make the present Plan equitable and feasible. The Congress has provided ample machinery for the settlement of income tax controversies and the provisions in respect to them are exclusive, subject to exceptions by circumstances not herein demonstrated, for the withdrawal of the Tennessee offer destroys the argument that the Security Holders would suffer irreparable injury if the properties of the Debtors were not disposed of by sale. We do not reach the meritorious question raised by the Trustees with respect to the meaning of § 337 because the Court is barred from considering it by the limitation in the Declaratory Judgment Act and the prohibition contained in § 7421. On either, or both, of these grounds, we sustain the District Court in denying the petition of the Trustees for approval of their last submitted Plan of reorganization.

The Question of Post-Bankruptcy Interest. By our previous decisions, claims of Columbia Gas & Electric Corporation were subordinated to the claims of other creditors rather than rejected, In re American Fuel & Power Co., 6 Cir., 151 F. 2d 470, 479. Our specific language was: "Claim of Columbia Gas & Electric Corporation, based upon its ownership of Mortgage Bonds issued by Irland, is not to be rejected but is to be subordinated to the claims of other creditors." In 187 F. 2d 813, 819, we said: "The

order will be amended by direction to subordinate the claims of Columbia to the public holders of Kentucky and American Fuel obligations secured by pledges of Inland stock in recognition of their creditors status. Columbia claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors." We adhered to those rulings. 217 F. 2d 207. Following them, Columbia no longer took active part in the reorganization proceedings. No specific statement was made in any of the prior determinations respecting interest on the Kentucky bonds and debentures because at the time it was not apparent that the surplus assets of Inland would be sufficient to pay the principal of such obligations. It now appears that through continued successful operation of the Trustees, such Bonds and Debentures can be paid in full with a surplus remaining after such payment; and Columbia has returned to the case with a challenge to the provisions of the present Plan which require that such surplus be applied to liquidate the interest obligations of the Debtors on such securities. It contends that since its claims were not rejected, it is entitled to payment thereon before payment of post-bankruptcy interest, since the Kentucky Bonds and Debentures were unsecured by pledges of the Inland stock held by Kentucky. With this position the District Court was in agreement.

[3] The general rule in bankruptcy and in equity receiverships has been that interest on the Debtors' obligations ceases to accrue at the beginning of proceedings. This is based upon reasoning that interest is a penalty for delay in payment, and where the power of the debtor to pay his contractual obligations is suspended by law, interest during suspension may not be accrued, if the courts are properly to preserve and protect the estate for the benefit of all interests involved. There are, however, well recognized exceptions to this general rule. (1) If the alleged bankrupt proves solvent, post-bankruptcy interest

is paid before any surplus reverts to the Debtor. (2) If securities held by a creditor as collateral produce interest or dividends during bankruptcy such amounts are applied to post-bankruptcy interest. (3) If the value of the security is more than sufficient to pay both principal and interest thereon, payment of post-bankruptcy interest is allowed to the date of payment of the claim secured thereby. There was for a period a difference of opinion as to allowance of interest on tax claims. They were considered in some jurisdictions as claims of higher dignity than general claims. This difference has now been resolved by the City of New York v. Saper, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 710, and they are now regarded as debts on a par with other debts of the bankrupt.

[4] Whether interest should be allowed upon claims against the bankrupt Debtors is, we think, no longer to be determined by their relative dignity, in the light of the Saper case. Our decision must be reached by balancing the equities as between Columbia and the Kentucky creditors who have waited so long for the payment of their claims. "It is manifest," said Mr. Justice Black, for the majority, in Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 67 S. Ct. 237, 241, 91 L. Ed. 162, "that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and debtor." It is clear to the writer from this observation and the rationalization in Sampsell v. Imperial Paper & Color Corporation, 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 1293, In re Deep Rock Oil Corporation, 10 Cir., 113 F. 2d 266, certiorari denied, Standard Gas & Electric Co. v. Taylor, 311 U. S. 699, 61 S. Ct. 138, 85 L. Ed. 453, and its predecessor, Taylor v. Standard Gas & Electric Co., 306 U. S. 307, 618, 59 S. Ct. 543, 83 L. Ed. 669, that, as said in Sampsell, 313 U. S. at page 219, 61 S. Ct. at page 907, "The power of the bankruptcy court to subordinate

claims or to adjudicate equities arising out of the relationship between the several creditors is complete," and the further observation that "To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice." That such burden is fully borne here and by our earlier decisions amply demonstrated.

We said in 211 F. 2d 381, 384: "It would be not only an anomaly but would fly in the face of the rationale of all prior adjudications to permit Columbia, directly or indirectly, to receive any portion of Inland's surplus while the secured creditors of Kentucky were still, to large extent, unpaid." This concept pervades all previous adjudications and includes, by necessary inference, the entire debt owing to Kentucky Bond and Debenture Holders up to the time that they are paid, either in cash or by stock in a newly organized corporation, for Kentucky as well as Inland and American was the beneficiary of Columbia's subrogation resulting from its highly inequitable conduct by which all three of these integrated Debtors were placed under the jurisdiction of the Bankruptcy Court. With such result, the SEC agrees.

Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present posture of this proceeding. The SEC complains of the decision of the District Judge to the effect that the Kern Plan for an internal reorganization was not worthy of consideration and, therefore, should not be submitted to the Commission. The Court having directed the Trustees to frame and submit a new Plan of reorganization, which may or may not contain a provision for sale of the properties, or which may or may not submit some form of internal reorganization, there will be time and opportunity to consider such new approach to the problems here involved. We may not speculate at this time in respect to the provisions of the new approach or whether the Court will find it worthy of consideration by the SEC. Until such Plan is submitted,

we make no decision upon the grievance of the SEC. The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions holding the public creditors of Kentucky entitled to be treated as creditors of Inland Gas before the claims of Columbia Gas or the stockholders of Inland may be recognized. The holders of Kentucky bonds and debenture asks us to dismiss the petition of the Allen Committee on the ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal, as well as that of Spilman, representing Stockholders of American, on the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed.

The seven appeals from the order of the Court, entered March 14, 1956, so variously approve and disapprove of that order and respond variously to contentions of appellants and appellees that it would be difficult and confusing to frame a specific mandate in each case to implement our holdings herein. The writer thinks it sufficient, therefore, to direct the dismissal of the petitions of the Allen Committee and Edward D. Spilman in case No. 12865, and to direct that a single mandate be entered in each of the appeals, amending the order of the District Court in the single respect that it holds post-bankruptcy interest may not be recovered by the holders of Kentucky bonds and debentures and, as so amended, affirming the order, without ruling on the merits of the SEC contention that the Kern Plan be submitted to it for consideration. With this my colleagues do not wholly agree.

[5] Since it now appears from the concurring opinions of my brothers that while they concur in all respects with

the above opinion, save only in the view that post-bankruptcy interest shall be allowed on the Kentucky bonds and debentures, it follows that the order of the district judge is not to be amended but that in all respects it must be and it is hereby affirmed.

Wherefore, the petition of the Allen Committee and Edward D. Spilman is hereby dismissed and the order of the District Judge is hereby,

Affirmed.

MILLER, *Circuit Judge*

I concur with the views and ruling of the foregoing opinion except insofar as it expresses the view that post-bankruptcy interest should be allowed to the public holders of bonds and debentures of Kentucky. In that respect I agree with the ruling of the District Judge who was of the view that the proposed plan of reorganization should not be approved because, in addition to the uncertainties resulting from the undetermined tax question, it erroneously provided for the payment of post-bankruptcy interest.

As stated in the opinion, the general rule in bankruptcy and in equity receiverships is well settled that interest on the debtor's obligations ceases to accrue at the start of bankruptcy proceedings. Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 163, 67 S. Ct. 237, 91 L. Ed. 162; Sexton v. Dreyfus, 219 U. S. 339, 344, 31 S. Ct. 256, 55 L. Ed. 244; City of New York v. Saper, 336 U. S. 328, 330-331, 69 S. Ct. 554, 93 L. Ed. 710. There are two well-recognized exceptions to this general rule. (1) If the alleged "bankrupt" proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor, and (2) if securities held by a creditor as collateral produce interest or dividends during bankruptcy, such amounts are applied to post-bankruptcy interest on the secured debt. American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry.,

233 U. S. 261, 267, 34 S. Ct. 502, 58 L. Ed. 949; City of New York v. Saper, supra, 336 U. S. 328, at page 330, 69 S. Ct. 554, at page 555, Note 7. This Court and some other courts have recognized a third exception, namely, where the value of the security is more than sufficient to pay the principle of the debt secured, the excess should be applied to post-bankruptcy interest on the obligation so secured. In re Macomb Trailer Coach, 6 Cir., 200 F. 2d 611, 613, certiorari denied McInnis v. Weeks, 345 U. S. 958, 73 S. Ct. 940, 97 L. Ed. 1378, with cases cited therein.

Appellants attempt to avoid the effect of the rule disallowing post-bankruptcy interest on unsecured claims by taking the position (1) that the bonds of Kentucky are secured claims, or (2) if they are unsecured claims, the claims of Columbia should be rejected rather than subordinated, which would eliminate any contest between Columbia and the public holders of bonds and debentures of Kentucky. We have rejected these contentions in prior appeals. The Court in the present case is unanimous in its view that those rulings be adhered to. For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors.

Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 1293 and Pepper v. Litton, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281, the Court had authority to disallow the claim of Columbia. Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. When all other creditors are paid in the manner which the bankruptcy law recognizes as payment in full, the subordination has been carried out and the creditor is entitled, as a creditor, to its rights in the remaining assets. Jamison v. Federal Deposit Insurance Corp.,

5 Cir., 149 F. 2d 199, 200. A denial of this right is in substance a rejection or disallowance of the claim, which this Court has heretofore declined to do.

Appellants in effect urge upon us a fourth exception to the general rule, namely, that post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made to a claim of a lower rank. They contend that it is immaterial whether the difference in rank arises out of the contractual terms of the creditors' claims or because one creditor has been subordinated to other creditors because of the inequitable and unconscionable conduct of the subordinated creditor, as in the present case.

I do not believe the authorities support that contention. On the contrary, such a contention appears to me to be expressly rejected by the Supreme Court in City of New York v. Saper, supra, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 710. The tax claim in that case on which post-bankruptcy interest was denied was of a higher ranking than claims of general creditors. Section 64, sub. a(4), Bankruptcy Act, Sect. 104, sub. a(4), Title 11, U. S. C. A. The Court said 336 U. S. at page 337, 69 S. Ct. at page 559: "The Court of Appeals concluded that by the 1926 Amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to §§ 64, sub. a, and 57, sub. n [11 U. S. C. A. § 93, sub. n]." The same rule has been held applicable in a reorganization proceeding under Chapter X. United States v. Edens, 4 Cir., 189 F. 2d 876, affirmed 342 U. S. 912, 72 S. Ct. 357, 96 L. Ed. 682. See also: United States v. General Engineering & Mfg. Co., 8 Cir., 188 F. 2d 80, affirmed 342 U. S. 912, 72 S. Ct. 358, 96 L. Ed. 682; Pavone Textile Corp. v. Bloom, 302 N. Y. 206, 97 N. E. 2d 755, affirmed sub nom., United States v. Bloom, 342 U. S. 912, 72 S. Ct. 357, 96 L. Ed. 682; Commonwealth of Massachusetts v. Thompson, 1 Cir., 190 F. 2d 10, certiorari denied

342 U. S. 918, 72 S. Ct. 364, 96 L. Ed. 686; Sword Line v. Industrial Commissioner, 2 Cir., 212 F. 2d 865, certiorari denied 348 U. S. 830, 75 S. Ct. 53, 99 L. Ed. 654; National Foundry Co. of New York v. Director of Internal Revenue, 2 Cir., 229 F. 2d 149. The exception was not recognized by this Court in New York Trust Co. v. Detroit, T. & I. Ry., 6 Cir., 251 F. 514. To the same effect is Jamison v. Federal Deposit Insurance Corp., supra, 5 Cir., 149 F. 2d 199; United States v. Paddock, 5 Cir., 187 F. 2d 271, 276; Application of Progress Shoe Co., D. C. E. D. N. Y., 107 F. Supp. 114, 116; Squire v. American Express Co., 131 Ohio St. 239, 260, 2 N. E. 2d 766.

Appellants rely upon Vanston Bondholders Protective Committee v. Green, supra, 329 U. S. 156, 67 S. Ct. 237, 240, 91 L. Ed. 162. Although the Court expressed the view in the opinion in that case that there should be a balancing of equities between creditors, it also restated the general rule that in bankruptcy and in equity receivership "interest on the debtors' obligations ceases to accrue at the beginning of proceedings." The actual ruling in the case was a disallowance of interest on interest on secured claims. The Court pointed out, 329 U. S. at page 166, 67 S. Ct. at page 241, that where the failure to pay interest when due is the result of an order of the bankruptcy court, entered for the joint benefit of debtor, creditors and the public, it was not consistent with equitable principles to enrich the mortgage bondholders at the expense of subordinate creditors, even though their mortgage contract called for the payment of interest on interest. We have a similar situation in the present case.

In re Deep Rock Oil Corp., 10 Cir., 113 F. 2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U. S. 699, 61 S. Ct. 138, 85 L. Ed. 453, lends some support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., supra, 233 U. S.

261, 34 S. Ct. 502, 58 L. Ed. 949, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling.

I am of the view that the public holders of bonds and debentures of Kentucky are not entitled to the payment of post-bankruptcy interest. I concur in the views of Judge Martin, hereinafter expressed, with respect to the tax phase of the controversy.

MARTIN, *Circuit Judge.*

In my view, the judgment of the district court should be affirmed in entirety. It is elementary that, except in certain situations not applicable here, the courts of the United States have jurisdiction only where granted, both by the Constitution of the United States and by an Act of Congress. It is equally basic that the Congress has power to limit the jurisdiction of the inferior courts and has often done so. The requirement of a minimum jurisdictional amount in certain cases is an example of such Congressional limitation.

The Declaratory Judgments Act, section 2201 of Title 28, U. S. C. provides: "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States * * * upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [Emphasis added.]

The argument urged is that jurisdiction to adjudicate the tax question raised in the petition dismissed by the district court is not based upon the Declaratory Judgments Act and therefore is not subject to its interdiction "with respect to Federal taxes."

The Trustee insists that he, as Trustee of the debtor corporation, is an officer of the bankruptcy court; and that, in such capacity, he has the right and also the duty to petition the court for advice and instructions concerning disbursement of funds of the debtor's estate to the taxing authorities. His contention is that the bankruptcy court as a court of equity has jurisdiction to adjudicate finally the rights of the parties, even though these rights be based upon future contingencies; and that it is the duty of the court to exercise its jurisdiction in this respect.

The *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not the Congress had *withdrawn* from United States Courts the jurisdiction to adjudicate tax matters before the occurrence of the taxable event. In my judgment, the Federal Declaratory Judgments Act has withdrawn from the courts of the United States jurisdiction to adjudicate prematurely matters "with respect to Federal taxes."

The Trustee contends that such inhibition of the Federal Declaratory Judgments Act does not apply, for the reason that the jurisdiction of a federal court sitting in bankruptcy to entertain a trustee's petition for instructions is not founded upon that Act. But the *source* of the jurisdiction is unimportant where jurisdiction has been withdrawn subsequently by the Congress. Appellant's brief invites attention to the fact that the "absence of a federal declaratory judgments statute did not deter the District Court from rendering a decision on a petition for instructions in the case of Scott v. Western Pacific R. R. Co." 9 Cir., 1917, 246 F. 545, 546. Appellant points to the following language in that opinion: "Receivers are officers of the court, and by all authority may properly ask instructions from the court concerning the administration of the property in their hands. [Citing authorities.] That the question presented to them involves payment of taxes does not change the rule."

The interdiction of the Federal Declaratory Judgments Act has changed this rule with respect to taxes. Therefore, I do not consider that the authority cited gainsays the conclusion reached here.

Appellant advances several arguments to support the proposition that the Federal Declaratory Judgments Act created a new form of action in the federal courts and was not intended to limit existing remedies. He directs attention to the title of the statute, "Creation of [a] remedy," and quotes the Senate Committee Report in relation to the Act, which states: "The proposed section 274d would simply extend declaratory relief to other cases, provided the parties and the subject matter are within the jurisdiction of the federal courts, in the same way that such relief has been extended in England. * * *"

Study of the history of the Act reveals that the words "except with respect to Federal taxes" upon which this issue turns were not a part of the original statute, but were inserted by amendment in 1935. 49 Stat. 1027. Therefore, the quoted Senate Report would have no bearing. Even if this were not true, it is difficult to believe that an act creating new remedies would not modify standing remedies where inconsistent with the new legislation. *A fortiori*, an express prohibition cannot be nullified simply because a contrary rule is in effect at the time of the new enactment.

Appellant attaches some importance to the fact that he, as Trustee of the debtor corporations, is an officer of the court and that under the surrounding circumstances these corporations are not ordinary taxpayers, inasmuch as they are engaged in a reorganizational liquidation under Chapter X of the Bankruptcy Act. The Congress has announced public policy in this matter in section 960 of Title 28, U. S. C., as follows: "§ 960. Tax liability. Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

From the above language, it is clear that the Trustee o the debtor corporations *is on* the same footing with an other taxpayer. As a practical matter, there would seem to be no reason why the law should be otherwise. A *solven* corporation engaged in a reorganization may have a equally large amount of tax liability, contingent upon th outcome of litigation subsequent to the occurrence of a potentially taxable event. There is no reason why an *in solvent* corporation should be in a preferred position. Th possible loss of a favorable business transaction is insuffi cient reason of itself to create the extraordinary circum stances necessary for the injunctive relief sought by appel lant. The Internal Revenue Code of 1954, section 7421 states the general rule: "(a) Tax. * * * no suit for th purpose of restraining the assessment or collection of an tax shall be maintained in any court." This restrain against injunctive action is not absolute. The Supreme Court has recognized this modification: "* * * in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." Miller v Standard Nut Margarine Co., 284 U. S. 498, 509, 52 S. Ct 260, 263, 76 L. Ed. 422.

This court has held that any exception to the universa ity of the application of section 7421 of the Internal Revenu Code must turn upon "present extraordinary and entirel exceptional circumstances." John M. Hirst & Co. Gentsch, 6 Cir., 1943, 133 F. 2d 247, 248. We stated the that the "circumstances that are to be considered extr ordinary or exceptional have never, of course, been cat logued." In my judgment, departure from the clear stat tory prohibition is not warranted in the present circu stances.

Inasmuch as the United States District Court had no *jurisdiction* over the subject matter in the tax phase of this proceeding, it is unnecessary to consider whether there was personal jurisdiction over the several taxing authorities and whether the rulings of the Commissioner as to the effect of section 337 of the Internal Revenue Code are correct.

I am in accord with the conclusion of Judge MILLER, for the reasons stated by him, that post-bankruptcy interest should not be allowed to the public holders of the bonds and debentures of Kentucky Fuel Gas Corporation.

The order of the United States District Judge dismissing the Trustee's petition for adjudication of the tax liability for lack of jurisdiction should, in my judgment, be affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 12,862

PAUL E. KERN, a Creditor of Kentucky Fuel Gas Corporation,

Appellant,

v.

BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, et al.,

Appellees.

Before SIMONS, Chief Judge, MARTIN and MILLER, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

/s/ CHARLES C. SIMONS
Chief Judge

FILED
February 14, 1957
Carl W. Reuss, Clerk

Order

Nos. 12,861—12,867

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

In the Matter of

Inland Gas Corporation,

Debtor,

In the Matter of

Kentucky Fuel Gas Corporation,

Debtor,

In the Matter of

American Fuel & Power Company,

Debtor.

Filed May 8, 1957

Carl W. Reuss, Clerk

Before:

Simons, *Chief Judge*, Martin and Miller, *Circuit Judges*.

The petitions for rehearing with requests for further oral argument en banc, filed herein by the Vanston Committee for Kentucky Fuel Gas Corporation First Mortgage Bonds, The Committee for the Holders of 6½% Debentures of Kentucky Fuel Gas Corporation, and Paul E. Kern, having been considered by the Court:

And the Court adhering to the views previously expressed in its opinion of February 14, 1957, and in conformity with its rule with respect to hearings en banc on petitions for rehearing: *N. L. R. B. v. Cambria Clay Products Co.*, 229 F. (2) 433, C. A. 6th; *Northwest Airlines, Inc. v. Glenn L. Martin Co.*, 229 F. (2) 434, C. A. 6th;

IT IS ORDERED that the petitions for rehearing and requests for further oral argument en banc be denied.

Approved for entry:

s SHACKELFORD MILLER, JR.,
U. S. Circuit Judge

Nos. 12,861-12,867

SIMONS, Chief Judge, dissenting. While I agree with that part of the order in the above causes which rejects the suggestion contained in the petitions for rehearing therein by the full membership of the court sitting en banc, contrary to our practice, I am of the opinion that the petitions for rehearing on the subject of post-bankruptcy interest opinion in the case.
should be granted, for the reasons developed in my original

APPENDIX B

The pertinent provisions of the Bankruptcy Act, 52 Stat. 840, 11 U. S. C. 1 *et seq.*, are as follows:

Section 57n, 11 U. S. C. 93n: Except as otherwise provided in this Act, all claims provable under this Act, including all claims of the United States and of any State or subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed: * * *

Section 63a (1), 11 U. S. C. 103a (1): Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date * * *

Section 102, 11 U. S. C. 502: The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however*, That section 23, subdivisions h and i of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive * * *

Section 106, 11 U. S. C. 506: For the purposes of this chapter, unless inconsistent with the context—

(1) "claims" shall include all claims of whatever character against a debtor or its property, except stock, whether or not such claims are provable under section 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent: * * *

(4) "creditors" shall mean the holder of any claim:

* * *

Section 174, 11 U. S. C. 574: After the hearing, as provided in Section 169 or Section 170 of this Act, and, if a plan has been submitted to the Securities and Exchange Commission, as provided in Section 172 of this Act, then after the filing of the report or notice that it will not be filed, or after the expiration of the time for its filing, whichever first occurs, the judge shall enter an order approving the plan or plans which in his opinion comply with the provisions of Section 216 of this Act, and which are fair and equitable, and feasible, and shall fix a time within which the creditors and stockholders affected thereby may accept the same.

* * *

Section 221, 11 U. S. C. 621: The judge shall confirm a plan if satisfied that—

* * *

(2) The plan is fair and equitable and feasible * * *